

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

COREY JUAN BURTON, a/k/a COREY JJUAN
BURTON,

Defendant-Appellant.

UNPUBLISHED

June 3, 2008

No. 278148

Wayne Circuit Court

LC No. 05-004348-01

Before: Davis, P.J., and Murray and Beckering, JJ.

PER CURIAM.

Defendant appeals his convictions, following a bench trial, of felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon (CCW), MCL 750.227, and possession of a firearm during the commission of a felony (felony firearm), MCL 750.227b. He was sentenced to prison terms of two to five years each for the felon in possession and CCW convictions and two years for the felony-firearm conviction. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

At defendant's trial, three police officers testified that they observed defendant remove a silver handgun from his waistband and toss it into the back seat of a car. Defendant testified that the gun in question was not his. Defendant contends that the trial court erred in failing to admit his testimony about statements made by Wesley Banks under the excited utterance exception. "The decision whether to admit evidence is within a trial court's discretion." *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). The trial court's decision will be reversed only where there has been an abuse of discretion. *Id.* We find that, because defendant failed to establish that there was a startling event and that the resulting statement was made while Banks was under the excitement caused by the event, MRE 803(2), the trial court did not abuse its discretion by not admitting defendant's testimony about the statements made by Banks.

Defendant next contends that the gun was not "concealed" as required by MCL 750.227 because it was visible to the police officers. MCL 750.227(1) provides that a person shall not carry a concealed dangerous weapon on or about his or her person. In *People v Jones*, 12 Mich App 293, 295; 162 NW2d 847 (1968), this Court held that the word "concealment" for purposes of MCL 750.227 does not mean total concealment. Rather, a weapon is concealed when it is "not discernible by the ordinary observation of persons coming into contact with the person carrying it, casually observing him, as people do in the ordinary and usual associations of life."

Id. at 296. “The reviewing court must evaluate the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.” *People v Osantowski*, 274 Mich App 593, 613; 736 NW2d 289 (2007).

In the case at hand, the police officers were not “casually observing” defendant. Testimony revealed that the officers were patrolling the area in question because it was a high narcotics area. The officers testified that they observed defendant remove a handgun from his waistband and throw the gun into the parked car. We find that a rational trier of fact could conclude that there was sufficient evidence that defendant concealed a gun on his person.

Defendant next contends that the trial court assumed facts not in evidence when it concluded that the weapon was found in an operating vehicle. Although an “operating vehicle” is not an element of carrying a concealed dangerous weapon on one’s person, we acknowledge that the trial court specifically found that the car was operative because the rear window was down. However, because a finding that the car was operational is not essential to establish the elements of carrying a concealed weapon on one’s person, this error, if any, was harmless.

Next, defendant argues that the failure to fingerprint the gun created a reasonable doubt that he had possessed the weapon. However, as we discussed above, a rational trier of fact could find that the essential elements of carrying a concealed weapon on one’s person were proven beyond a reasonable doubt. Thus, this argument fails.

Defendant also contends that his due process rights were violated because the police acted in bad faith by not securing the fingerprints of the gun. Although defendant raised the issue of failing to fingerprint the gun below as a sufficiency of the evidence question, he did not raise the constitutional due process claim. This Court reviews unpreserved claims of constitutional error for outcome-determinative plain error. *People v McNally*, 470 Mich 1, 5; 679 NW2d 301 (2004).

This Court has stated that, “[a]bsent a showing of suppression of evidence, intentional misconduct, or bad faith, the prosecutor and the police are not required to test evidence to accord a defendant due process.” *People v Coy*, 258 Mich App 1, 21; 669 NW2d 831 (2003). Defendant’s attorney questioned Officer Tyrone Spencer about the request for a forensic examination. Although defendant’s attorney stated that she had the request in her hand, this request was not admitted into evidence during the trial. Further, Officer Spencer testified that he did not know whether or not he received the request. We find that this evidence does not demonstrate that the police acted in bad faith, and therefore defendant has failed to establish plain error.

Affirmed.

/s/ Alton T. Davis
/s/ Christopher M. Murray
/s/ Jane M. Beckering